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Discussion

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Discussion Following the Remarks of Mr. Donald deKieffer and Mr. Frank Stone

QUESTION, Mr. Robert Latimer: Mr. deKieffer, I'm particularly concerned about your implication that the GATT is irrelevant, that countries can ignore it if they wish. Would you comment on this?

ANSWER, Mr. deKieffer: I did not intend to imply that the GATT is irrelevant. The GATT is probably one of the most effective means of resolving problems without confrontation in the international trade area. But, you must remember that there is no "GATT jail." The GATT is an organizational consensus and its members have an agreement *vis-a-vis* rules which are highly flexible.

The Subsidies Code, for example, is one of the most controversial areas of the GATT. It is also convoluted and internally contradictory. It essentially provides nothing more than a framework for further discussions—for an area which is one of major disagreement among the trading nations. Such provisions are not binding international law; they cannot be read literally. Articles XXIV and XXV are, similarly, not self-explanatory, but only frameworks for discussion.

The GATT *vis-a-vis* the United States appears to be more than an executive agreement and less than a treaty. It probably has the effect of binding U.S. law, except insofar as it is inconsistent with that law. (In the 1979 Trade Agreement Act, for instance, the definitions of subsidies were not consistent with those used in the GATT Subsidies Code.) That is the way the GATT is written, it's not designed to be a body of law. It's designed to be a context and framework for reaching a consensus on intractable problems.

One of the problems with the GATT is there is no GATT court. The dispute settlements mechanism and resolution is less than satisfactory for interpreting what the codes mean. Unless there is some mechanism that is set up to resolve legitimate differences of opinion as to the intent of the negotiators, then much of the GATT will be of more academic than realistic interest. I would rather the GATT be strengthened by institutionalizing mechanisms for resolving these types of disputes.

COMMENT, Professor Robert Hudec: It is my understanding that the compensation due under GATT Article XXIV(6) negotiations is not compensation for forming a free-trade area, but for the unbinding realignment of a tariff. Also, it is clear that the GATT is inferior to any U.S. federal law, though certain GATT agreements, such as the Subsidies Code, have been legislated into federal law.

You are probably correct, Mr. deKieffer, that because of their

power, and because there is precedent, the United States and Canada could make a free-trade agreement which would not comply with Article XXIV. But it would be a great mistake to think that it would be an easy thing to do. There was a vehement reaction to the auto parts waiver from the GATT nations. The Caribbean Basin issues has encountered opposition and delay. The fact is that reactions of governments in the GATT are not based on neutral principles, but on seizing advantageous opportunities. The European Community will look very carefully at any Article XXIV action by the United States.

What is missing from the analysis is the real cost of pursuing an agreement which may not conform to the GATT. Article I has been allowed to atrophy under several non-conforming agreements, but for the United States to ignore it entirely would be a major piece of commercial policy making. I believe there is no more important way of stopping protectionism than to insist on a new commitment in the GATT—a serious treaty binding commitment. There would not be the problems we now face if the GATT governments had generalized every trade restriction against every affected country.

COMMENT, Mr. deKieffer: Article I of the GATT will certainly be harmed if countries like Canada and the United States, which have close and large trading relations, decide to act bilaterally outside the GATT system. Moreover, there is really no need for such an action. Trading relations between Canada and the U.S. are reasonable and frictions are resolved relatively easily. It would be dangerous to form a bilateral agreement outside of the GATT because it would send a signal to Geneva that the two countries find Article I—and the GATT itself—to be irrelevant.

That would raise serious questions with the GATT members as to whether or not the future in trade policy was in bilateral and trilateral deals and, further, whether the GATT was becoming meaningless as a forum for resolving overall trading problems. I think it would be a mistake for the United States and Canada to make a bilateral trade agreement of this large a scope. It would be a mistake to move away from multilateralism and Most Favored Nation treatment into sidebar bilateral agreements as a matter of national policy. Further, the GATT should be made a credible threat, which it is not right now. It must be strengthened, and bilateral deals do not add to the ability to enforce international trade laws.

COMMENT, Professor Andreas Lowenfeld: Mr. deKieffer, you say that the GATT is only a useful forum, but it's much more than that. It's a code of conduct based on a conclusion reached more than thirty years ago that discriminatory deals eventually bring on economic hardship, whereas MFN has, in general, brought on prosperity. The economic growth in the past thirty-five years has been greater than any period in history—that is not unrelated to the GATT.

COMMENT, Mr. Jon Fried: I think it's incorrect to presume that

bilateral action between the United States and Canada will necessarily be inconsistent with GATT Article XXIV. The intent of both governments seems to be to move in a manner supportive of the international and multilateral trading system. It is wrong to presume in advance that a Canada-U.S. agreement would be inconsistent with their obligations under the GATT.

COMMENT, Professor Robert Hudec: With respect to dispute settlements, it is true that the GATT dispute settlement procedure has suffered some major defeats in the last few years. That has happened because issues which could not be settled over the bargaining table were being brought before a GATT panel, a rather fragile institution. The GATT panels were being asked to solve major policy disputes, and they ended up in a deadlock.

But, the GATT dispute settlement procedures are, in a structural sense, stronger now than they have ever been. The GATT has developed a well trained legal staff working on the dispute cases. The procedures are much more defined than in the past. Steps are now being taken, for the first time, to select genuinely neutral, independent and non-governmental panel members.

QUESTION: Mr. Ivan Feltham: Mr. Stone, knowing how the GATT has developed, will any agreement between Canada and the U.S., on a bilateral basis, not be compatible with the GATT?

ANSWER, Mr. Stone: The problem at this point is that we do not know what either government is going to do. If an agreement is reached, will it be done on a GATT-worthy basis or on a preferential basis. It will probably be more difficult for a sectoral approach to conform to the GATT than a comprehensive approach. If customs duties are removed between the two countries on products from a few sectors, and this treatment is not extended to other countries, there are problems under Article XXIV. A comprehensive approach, on the other hand, could be brought before a GATT panel and successfully argued to conform with that article. But even then, many GATT countries will complain of unfair treatment. Any agreement will have many problems in regards to the GATT. Canada has a very good record of observing its GATT obligations. It takes the GATT very seriously as its trade agreement with the United States.

COMMENT, Mr. Peter Suchman: I have difficulty accepting the argument that the objectives of multilateral trade might be furthered by negotiating a bilateral agreement which is consistent with Article XXIV. The issue is not whether a bilateral agreement will be consistent with Article XXIV. The real question is whether or not Article I can survive such an agreement. That issue has not been raised on the American side, either in the Israeli agreement or in the discussions of a Canada-U.S. agreement. The position that multilateral trade will somehow benefit from such agreements is hard to understand. Instead of asking what type

of arrangement we should have between Canada and the U.S., we should ask whether we should be talking of such a bilateral deal at all.

We are beginning to hear the U.S. Trade Representative say that it is no longer possible to negotiate multilaterally because of the numerous small countries which need to be satisfied on any agreement. My concern is that by pursuing bilateral agreements, the United States is abandoning its fifty year commitment to multilateralism. Perhaps a bilateral arrangement with Canada will lead to greater progress in trade throughout the world, but that is not what seems to be the thrust of agreements like the Israeli trade agreement.

COMMENT, Professor Hudec: Even if a Canada-United States agreement conformed to Article XXIV it might do serious damage to the GATT system. We know, from the experience of the European Community, that the situation does not end with the formation of an agreement. All of the other trading partners of both countries will suddenly be dislocated. There will be an array of secondary adjustments necessary because of the large discriminatory changes caused by the basic agreement. And, discrimination begets discrimination. It's a natural process that will not end with the signing of a Canada-U.S. agreement, even one that conforms to Article XXIV.

COMMENT, Professor Earl Fry: I disagree. I think what the Trade Representative is saying is that the U.S. has tried to get a new round of trade talks started and is not receiving any cooperation. He is therefore turning to those countries who do want to talk about free-trade, hoping that will lead to new multilateral discussions.

QUESTION, Mr. Lou Diggs: This discussion has understandably focused exclusively on trade in goods. Could you comment on whether it is realistic to expect the next GATT Round to develop rules for trade in services?

ANSWER, Mr. deKieffer: The issue of trade in services sounds good, the problem is: what does it mean? At the last GATT ministerial meeting the United States wanted discussion of trade in services and the LDCs opposed it, primarily because there was no clear definition attached to it. There has been a general consensus since that meeting to investigate this area. A working committee has been formed within the GATT whose first task was to define the types of services that the GATT might properly consider. Such a definition will probably be one of a few clearly defined services. Transborder data flow will perhaps be one of these. But, the whole panoply of services in the developed countries will not be negotiated in the GATT for the next five years at least. It is likely that the services issue will be discussed in a piecemeal fashion, with those services related to traded goods being first in line.